

**ASSEMBLY BILL**

**No. 2211**

**Introduced by Assembly Member Plescia**

February 18, 2004

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An act to amend Section 437c of the Code of Civil Procedure, relating to summary judgment.

LEGISLATIVE COUNSEL'S DIGEST

AB 2211, as introduced, Plescia. Summary judgment.

Existing law requires any opposition to a motion for summary judgment to be served and filed not less than 14 days before the hearing, and any reply to the opposition to be served and filed by the moving party not less than 5 days before the hearing, unless the court for good cause orders otherwise.

This bill would extend the opposition time period from 14 days to 21 days and the reply time period from 5 to 7 days.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 437c of the Code of Civil Procedure is  
2 amended to read:  
3 437c. (a) Any party may move for summary judgment in any  
4 action or proceeding if it is contended that the action has no merit  
5 or that there is no defense to the action or proceeding. The motion  
6 may be made at any time after 60 days have elapsed since the  
7 general appearance in the action or proceeding of each party  
8 against whom the motion is directed or at any earlier time after the

1 general appearance that the court, with or without notice and upon  
2 good cause shown, may direct. Notice of the motion and  
3 supporting papers shall be served on all other parties to the action  
4 at least 75 days before the time appointed for hearing. However,  
5 if the notice is served by mail, the required 75-day period of notice  
6 shall be increased by five days if the place of address is within the  
7 State of California, 10 days if the place of address is outside the  
8 State of California but within the United States, and 20 days if the  
9 place of address is outside the United States, and if the notice is  
10 served by facsimile transmission, Express Mail, or another method  
11 of delivery providing for overnight delivery, the required 75-day  
12 period of notice shall be increased by two court days. The motion  
13 shall be heard no later than 30 days before the date of trial, unless  
14 the court for good cause orders otherwise. The filing of the motion  
15 shall not extend the time within which a party must otherwise file  
16 a responsive pleading.

17 (b) (1) The motion shall be supported by affidavits,  
18 declarations, admissions, answers to interrogatories, depositions,  
19 and matters of which judicial notice shall or may be taken. The  
20 supporting papers shall include a separate statement setting forth  
21 plainly and concisely all material facts which the moving party  
22 contends are undisputed. Each of the material facts stated shall be  
23 followed by a reference to the supporting evidence. The failure to  
24 comply with this requirement of a separate statement may in the  
25 court's discretion constitute a sufficient ground for denial of the  
26 motion.

27 (2) Any opposition to the motion shall be served and filed not  
28 less than ~~14~~ 21 days preceding the noticed or continued date of  
29 hearing, unless the court for good cause orders otherwise. The  
30 opposition, where appropriate, shall consist of affidavits,  
31 declarations, admissions, answers to interrogatories, depositions,  
32 and matters of which judicial notice shall or may be taken.

33 (3) The opposition papers shall include a separate statement  
34 that responds to each of the material facts contended by the moving  
35 party to be undisputed, indicating whether the opposing party  
36 agrees or disagrees that those facts are undisputed. The statement  
37 also shall set forth plainly and concisely any other material facts  
38 that the opposing party contends are disputed. Each material fact  
39 contended by the opposing party to be disputed shall be followed  
40 by a reference to the supporting evidence. Failure to comply with



1 this requirement of a separate statement may constitute a sufficient  
2 ground, in the court's discretion, for granting the motion.

3 (4) Any reply to the opposition shall be served and filed by the  
4 moving party not less than ~~five~~ *seven* days preceding the noticed  
5 or continued date of hearing, unless the court for good cause orders  
6 otherwise.

7 (5) Evidentiary objections not made at the hearing shall be  
8 deemed waived.

9 (6) Except for subdivision (c) of Section 1005 relating to the  
10 method of service of opposition and reply papers, Sections 1005  
11 and 1013, extending the time within which a right may be  
12 exercised or an act may be done, do not apply to this section.

13 (7) Any incorporation by reference of matter in the court's file  
14 shall set forth with specificity the exact matter to which reference  
15 is being made and shall not incorporate the entire file.

16 (c) The motion for summary judgment shall be granted if all the  
17 papers submitted show that there is no triable issue as to any  
18 material fact and that the moving party is entitled to a judgment as  
19 a matter of law. In determining whether the papers show that there  
20 is no triable issue as to any material fact the court shall consider  
21 all of the evidence set forth in the papers, except that to which  
22 objections have been made and sustained by the court, and all  
23 inferences reasonably deducible from the evidence, except  
24 summary judgment may not be granted by the court based on  
25 inferences reasonably deducible from the evidence, if contradicted  
26 by other inferences or evidence, which raise a triable issue as to any  
27 material fact.

28 (d) Supporting and opposing affidavits or declarations shall be  
29 made by any person on personal knowledge, shall set forth  
30 admissible evidence, and shall show affirmatively that the affiant  
31 is competent to testify to the matters stated in the affidavits or  
32 declarations. Any objections based on the failure to comply with  
33 the requirements of this subdivision shall be made at the hearing  
34 or shall be deemed waived.

35 (e) If a party is otherwise entitled to a summary judgment  
36 pursuant to this section, summary judgment may not be denied on  
37 grounds of credibility or for want of cross-examination of  
38 witnesses furnishing affidavits or declarations in support of the  
39 summary judgment, except that summary judgment may be denied  
40 in the discretion of the court, where the only proof of a material fact

1 offered in support of the summary judgment is an affidavit or  
2 declaration made by an individual who was the sole witness to that  
3 fact; or where a material fact is an individual's state of mind, or  
4 lack thereof, and that fact is sought to be established solely by the  
5 individual's affirmation thereof.

6 (f) (1) A party may move for summary adjudication as to one  
7 or more causes of action within an action, one or more affirmative  
8 defenses, one or more claims for damages, or one or more issues  
9 of duty, if that party contends that the cause of action has no merit  
10 or that there is no affirmative defense thereto, or that there is no  
11 merit to an affirmative defense as to any cause of action, or both,  
12 or that there is no merit to a claim for damages, as specified in  
13 Section 3294 of the Civil Code, or that one or more defendants  
14 either owed or did not owe a duty to the plaintiff or plaintiffs. A  
15 motion for summary adjudication shall be granted only if it  
16 completely disposes of a cause of action, an affirmative defense,  
17 a claim for damages, or an issue of duty.

18 (2) A motion for summary adjudication may be made by itself  
19 or as an alternative to a motion for summary judgment and shall  
20 proceed in all procedural respects as a motion for summary  
21 judgment. However, a party may not move for summary judgment  
22 based on issues asserted in a prior motion for summary  
23 adjudication and denied by the court, unless that party establishes  
24 to the satisfaction of the court, newly discovered facts or  
25 circumstances or a change of law supporting the issues reasserted  
26 in the summary judgment motion.

27 (g) Upon the denial of a motion for summary judgment, on the  
28 ground that there is a triable issue as to one or more material facts,  
29 the court shall, by written or oral order, specify one or more  
30 material facts raised by the motion as to which the court has  
31 determined there exists a triable controversy. This determination  
32 shall specifically refer to the evidence proffered in support of and  
33 in opposition to the motion which indicates that a triable  
34 controversy exists. Upon the grant of a motion for summary  
35 judgment, on the ground that there is no triable issue of material  
36 fact, the court shall, by written or oral order, specify the reasons  
37 for its determination. The order shall specifically refer to the  
38 evidence proffered in support of, and if applicable in opposition to,  
39 the motion which indicates that no triable issue exists. The court



1 shall also state its reasons for any other determination. The court  
2 shall record its determination by court reporter or written order.

3 (h) If it appears from the affidavits submitted in opposition to  
4 a motion for summary judgment or summary adjudication or both  
5 that facts essential to justify opposition may exist but cannot, for  
6 reasons stated, then be presented, the court shall deny the motion,  
7 or order a continuance to permit affidavits to be obtained or  
8 discovery to be had or may make any other order as may be just.  
9 The application to continue the motion to obtain necessary  
10 discovery may also be made by ex parte motion at any time on or  
11 before the date the opposition response to the motion is due.

12 (i) If, after granting a continuance to allow specified additional  
13 discovery, the court determines that the party seeking summary  
14 judgment has unreasonably failed to allow the discovery to be  
15 conducted, the court shall grant a continuance to permit the  
16 discovery to go forward or deny the motion for summary judgment  
17 or summary adjudication. This section does not affect or limit the  
18 ability of any party to compel discovery under the Civil Discovery  
19 Act (Article 3 (commencing with Section 2016) of Chapter 3 of  
20 Title 3 of Part 4).

21 (j) If the court determines at any time that any of the affidavits  
22 are presented in bad faith or solely for purposes of delay, the court  
23 shall order the party presenting the affidavits to pay the other party  
24 the amount of the reasonable expenses which the filing of the  
25 affidavits caused the other party to incur. Sanctions may not be  
26 imposed pursuant to this subdivision, except on notice contained  
27 in a party's papers, or on the court's own noticed motion, and after  
28 an opportunity to be heard.

29 (k) Except when a separate judgment may properly be awarded  
30 in the action, no final judgment may be entered on a motion for  
31 summary judgment prior to the termination of the action, but the  
32 final judgment shall, in addition to any matters determined in the  
33 action, award judgment as established by the summary proceeding  
34 herein provided for.

35 (l) In actions which arise out of an injury to the person or to  
36 property, if a motion for summary judgment was granted on the  
37 basis that the defendant was without fault, no other defendant  
38 during trial, over plaintiff's objection, may attempt to attribute  
39 fault to or comment on the absence or involvement of the  
40 defendant who was granted the motion.

1 (m) (1) A summary judgment entered under this section is an  
2 appealable judgment as in other cases. Upon entry of any order  
3 pursuant to this section, except the entry of summary judgment, a  
4 party may, within 20 days after service upon him or her of a written  
5 notice of entry of the order, petition an appropriate reviewing court  
6 for a peremptory writ. If the notice is served by mail, the initial  
7 period within which to file the petition shall be increased by five  
8 days if the place of address is within the State of California, 10 days  
9 if the place of address is outside the State of California but within  
10 the United States, and 20 days if the place of address is outside the  
11 United States. If the notice is served by facsimile transmission,  
12 Express Mail, or another method of delivery providing for  
13 overnight delivery, the initial period within which to file the  
14 petition shall be increased by two court days. The superior court  
15 may, for good cause, and prior to the expiration of the initial  
16 period, extend the time for one additional period not to exceed 10  
17 days.

18 (2) Before a reviewing court affirms an order granting  
19 summary judgment or summary adjudication on a ground not  
20 relied upon by the trial court, the reviewing court shall afford the  
21 parties an opportunity to present their views on the issue by  
22 submitting supplemental briefs. The supplemental briefing may  
23 include an argument that additional evidence relating to that  
24 ground exists, but that the party has not had an adequate  
25 opportunity to present the evidence or to conduct discovery on the  
26 issue. The court may reverse or remand based upon the  
27 supplemental briefing to allow the parties to present additional  
28 evidence or to conduct discovery on the issue. If the court fails to  
29 allow supplemental briefing, a rehearing shall be ordered upon  
30 timely petition of any party.

31 (n) (1) If a motion for summary adjudication is granted, at the  
32 trial of the action, the cause or causes of action within the action,  
33 affirmative defense or defenses, claim for damages, or issue or  
34 issues of duty as to the motion which has been granted shall be  
35 deemed to be established and the action shall proceed as to the  
36 cause or causes of action, affirmative defense or defenses, claim  
37 for damages, or issue or issues of duty remaining.

38 (2) In the trial of the action, the fact that a motion for summary  
39 adjudication is granted as to one or more causes of action,  
40 affirmative defenses, claims for damages, or issues of duty within



1 the action shall not operate to bar any cause of action, affirmative  
2 defense, claim for damages, or issue of duty as to which summary  
3 adjudication was either not sought or denied.

4 (3) In the trial of an action, neither a party, nor a witness, nor  
5 the court shall comment upon the grant or denial of a motion for  
6 summary adjudication to a jury.

7 (o) A cause of action has no merit if either of the following  
8 exists:

9 (1) One or more of the elements of the cause of action cannot  
10 be separately established, even if that element is separately  
11 pleaded.

12 (2) A defendant establishes an affirmative defense to that cause  
13 of action.

14 (p) For purposes of motions for summary judgment and  
15 summary adjudication:

16 (1) A plaintiff or cross-complainant has met his or her burden  
17 of showing that there is no defense to a cause of action if that party  
18 has proved each element of the cause of action entitling the party  
19 to judgment on that cause of action. Once the plaintiff or  
20 cross-complainant has met that burden, the burden shifts to the  
21 defendant or cross-defendant to show that a triable issue of one or  
22 more material facts exists as to that cause of action or a defense  
23 thereto. The defendant or cross-defendant may not rely upon the  
24 mere allegations or denials of its pleadings to show that a triable  
25 issue of material fact exists but, instead, shall set forth the specific  
26 facts showing that a triable issue of material fact exists as to that  
27 cause of action or a defense thereto.

28 (2) A defendant or cross-defendant has met his or her burden  
29 of showing that a cause of action has no merit if that party has  
30 shown that one or more elements of the cause of action, even if not  
31 separately pleaded, cannot be established, or that there is a  
32 complete defense to that cause of action. Once the defendant or  
33 cross-defendant has met that burden, the burden shifts to the  
34 plaintiff or cross-complainant to show that a triable issue of one or  
35 more material facts exists as to that cause of action or a defense  
36 thereto. The plaintiff or cross-complainant may not rely upon the  
37 mere allegations or denials of its pleadings to show that a triable  
38 issue of material fact exists but, instead, shall set forth the specific  
39 facts showing that a triable issue of material fact exists as to that  
40 cause of action or a defense thereto.

1 (q) This section does not extend the period for trial provided by  
2 Section 1170.5.

3 (r) Subdivisions (a) and (b) do not apply to actions brought  
4 pursuant to Chapter 4 (commencing with Section 1159) of Title 3  
5 of Part 3.

6 (s) For the purposes of this section, a change in law does not  
7 include a later enacted statute without retroactive application.

